Malayan Banking Bhd v Russell Lua Kok Hiyong & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-172–04 OF 2018
RAJA AHMAD MOHZANUDDIN SHAH J
27 JANUARY 2025

Legal Profession — Solicitors — Professional liability — Bank filed action against solicitors alleging that solicitors breached contract and/or professional duties and negligently failed to protect bank's interest — Whether bank's action was time-barred — Whether there was a non-compliance with O 77 of the Rules of Court 2012 read together with the Partnership Act 1961 — Whether there were elements of res judicata, election or duplicity of proceedings in bank's action — Whether bank could succeed in its action based on testimony of witness who allegedly had no personal knowledge of the matter — Whether bank could maintain action under breach of contract and professional negligence in same suit — Whether loss was caused by bank's own breach coupled with fact that parties were complying with valid court order — Whether solicitor's duty of care towards bank was limited to litigation matters since solicitors was only on bank's litigation panel — Whether all partners of legal firm were liable — Evidence Act 1950 s 114(g) — Limitation Act 1953 s 6 — Partnership Act 1961 ss 11, 12 & 14 — Rules of Court 2012 O 77

The plaintiff ('the bank') was a financial institution whilst the defendants ('the solicitors/the legal firm') were partners in a law firm known as Messrs Lua & Mansor retained by the bank to represent it and once served on the bank's panel of lawyers. In the present case, the bank alleged that the Solicitors breached their contract and/or professional duties to the bank as well as negligently failed to protect the bank's interests, which was the very purpose for which the bank appointed the Solicitors. The dispute stemmed from a loan facility ('the facility') granted by the bank to a company known as Sparrows & Arrows Sdn Bhd ('Sparrows') which was secured by the guarantees given by Chew Nee Hee ('CNH') and Ling Yun Yoke ('LYY') as well as by an assignment to a property in Megan Avenue II ('the Megan property'). When Sparrows failed to make the relevant payment under the facility, the bank instructed the solicitors to file action against Sparrows and the guarantors, and the said action ended in the bank's favour ('the judgment'). the bank then instructed the solicitors to proceed with public auction of the Megan property at a reserve price of RM1.8m. Pending the public auction, on the request by CNH, the parties entered into a settlement arrangement ('the Shah Alam settlement') in relation to the judgment but such effort was in vain. Aside from that, there was also a proposal by LYY that the judgment and/or the Shah Alam settlement be payable from the proceeds of the public auction to be held over LYY's property

located in Damansara ('the Damansara property'). As events unfolded, based on the understanding that the bank had reached an agreement with LYY that the sums due under the Shah Alam settlement was to be paid to the bank from the proceeds of the auction of the Damansara property, Sparrows sold Megan property to Koperasi Kakitangan Petronas Bhd ('Kopetro') and sought the bank's cooperation to withdraw the pending auction of the Megan property. When the bank refused to do so, Sparrows filed an action against the bank ('the 314 Action') and managed to obtain, inter alia, the following: (a) an injunction to restrain the auction of the Megan property; (b) the court's order allowing Sparrows to sell the Megan property to Kopetro; and (c) a declaration that it was agreed between parties that the sum of RM1.8m was to be settled from the proceeds of the public auction carried out on 17 March 2011 in which the Damansara property was sold for a sum of RM3.8m (the said public auction was pursuant to a prohibitory order obtained by a company known as Gale Force Sdn Bhd against the Damansara property). The bank appealed against the court's decision in the 314 Action ('Appeal 314') but pending the disposal of such appeal, Sparrows had already transferred the Megan property to Kopetro on 22 June 2012. Subsequently, Appeal 314 was allowed but the Court of Appeal did not make any consequential order in relation to the Megan property. The solicitors, acting for the bank, subsequently filed a new legal action against Sparrows, Kopetro and the partners of Sparrows' second solicitors but the action was unsuccessful. The bank's appeal ('Appeal 413') had also suffered the same faith. In this regard, the appellate court in Appeal 413 found that: (i) the bank's claim was statute-barred; and (ii) the bank's suit was estopped by the principle of res judicata. Reverting to the present action, the bank had sought for the following relief against the solicitors: (A) damages in the sum of RM526,383.09; (B) damages to be assessed by the court; (C) interest; (D) general damages; and (E) costs. The preliminary issues that arose in the present action were as followed: (1) whether the bank's action was time-barred; (2) whether there was a non-compliance with O 77 of the Rules of Court 2012 read together with the Partnership Act 1961; (3) whether there were elements of res judicata, election or duplicity of proceedings in the bank's suit; (4) whether the bank could succeed based on a witness who allegedly had no personal knowledge of the matter — in this regard, the bank had only called PW1 who was a member of the bank's Federal Territory Regional Corporate Remedial Management team; and (5) whether the bank could maintain an action under breach of contract and professional negligence together. The substantial issues to be determined by the court were: (I) whether the loss was caused by the bank's own breach coupled with the fact that the parties were complying with a valid court order; (II) whether the legal firm's duty of care towards the bank was limited to litigation matters since the legal firm was only on the bank's litigation panel; and (III) whether all the firm's partners were liable.

Held, allowing the bank's claim against the solicitors with costs of RM50,000, subject to allocatur:

(1) The bank suffered a loss only when the Megan property was transferred to Kopetro on 22 June 2012. Therefore, the six-year limitation period would only begin to run from that date. Thus, when the bank initiated the present action on 23 April 2018, it was well within the timeframe under s 6 of the Limitation Act 1953. Moreover, the legal firm had a continuing duty to protect the bank's interests throughout its engagement until the Megan property was transferred to Kopetro. It was on this basis that the bank's cause of action against the solicitors began. Prior to this event, the bank had not suffered any losses (see paras 61–62).

(2) Considering the circumstances and history of the present dispute, specifically the relationship between the parties, the absence of a specific intitulement to expressly name and specifically sue the solicitors, partnership in the title of the action by explicitly stating 'sued as partners of Messrs Lua & Mansor' would not constitute a fundamental flaw in the bank's cause of action, nor would it undermine the entire foundation of the bank's claim. In this regard, the court found that the amended statement of claim which constituted the bank's pleadings, not only clearly identified the solicitors as partners at Messrs Lua & Mansor at all material times but also indicated the roles of the partners as well as the legal firm's liability in the event the bank succeeded in proving its claims. In addition to identifying the ingredients of its alleged cause of action, the bank had also set forth its claim against the solicitors in adequate detail (see paras 67 & 69).

(3) As a matter of fact, all the earlier suits differed in the underlying facts they addressed, as opposed to the causes of action and parties involved in the present case. Additionally, the court found that some of the issues in the current suit had never before been raised or pleaded. As could be seen from a closer examination of Appeal 413, there was an issue relating to an actual bona fide purchaser for value raised by the parties therein, whereas there was no such element in the present case. The present action was solely concerned with the solicitors' actions and omissions in the course of acting on behalf of the bank. Therefore, the bank did not abuse any legal process or violate any rule of res judicata or estoppel. As such, there were also no instances of duplication or multiplicity of proceedings (see paras 73, 75 & 77).

(4) The court found that the present action was a case in which the dispute was heavily based on documentation whose existence was not contested by either party in a significant way. In this sense, the court was not required to interpret the meaning or construction of the documents or agreements involved in the present dispute. As such, PW1's position as a witness was acceptable in the present case, subject to the proving of

evidence on a balance of probabilities basis. To this end, the undisputed documents spoke for themselves regarding the surrounding circumstances rather than the witnesses' accurate understanding or recollection of the events. Regarding the non-calling of expert witness by the bank, it was evident from the disclosure of the facts that the underlying main substantial issue was not complex enough to require expert testimony. Furthermore, there were no allegations that the bank suppressed or withheld evidence. As such, there was no basis for drawing an adverse inference based on s 114(g) of the Evidence Act 1950 (see paras 82–84, 87 & 89).

(5) On the basis of the Federal Court's decision in the case of *Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor* [2024] 3 MLJ 544, the court opined that tort and contract actions were not mutually exclusive and could co-exist (see para 100).

(6) The court found that the sale of the property to Kopetro and the transfer effected thereon resulted in a breach of not only the tort of negligence that governed the relationship between the parties in the present case but also the contractual relationship when the legal firm and the relevant solicitors failed to act in accordance with the retainer contracts, either explicitly or implicitly. This was evidenced by the fact that the bank had always instructed the legal firm to realise its assigned security through a public auction. As a result, there was an obligation on the legal firm to take all reasonable steps that a reasonably prudent solicitor would take upon being instructed to act as such. In this regard, the court found that a bank that had been given an absolute assignment by a borrower of the secured property by way of loan agreement cum assignment ('LACA'), as in the present case, was entitled to realise its security by way of a private sale. For this reason, the bank did not need to create a charge before realising its security. Similarly, the bank was also entitled to hold a public auction in accordance with the LACA despite the charge not being registered (see paras 117–118 & 123).

(7) Further, the court agreed with the bank's position that the legal firm, knowing that the strata title had been issued for the property and that the bank had not registered its charge, should have reasonably foreseen the risks associated with the issue document of title being in the hands of and registered in the name of the developer. This could, in turn, lead to the bank losing control of the Megan property, as happened in the present case. The court was of the view that obvious risks must always be brought to client's attention by solicitors (see paras 120 & 122).

(8) As far as protecting their clients' interests was concerned, solicitors' duty to act on behalf of their clients transcended their practice areas. Obviously, solicitors were responsible for protecting their clients' interests at all times. In the present case, when the legal firm was

appointed by the bank for both the recovery of loan in personam and, more importantly, for the realisation of Megan property in rem, the legal firm automatically assumed its duty in its professional capacity to protect the bank's interests not only in recovering the loan taken by Sparrows and its guarantors but also in ensuring that the Megan property was protected so that the bank could recover the loan from such security (see paras 127–128).

(9) As regards the position of the partners of the firm, based on the court's analysis of the facts and the law, it seemed trite that all defendants who were partners of the legal firm were jointly and severally liable for all the acts and omissions of the legal firm and/or any solicitor acting in the ordinary course of their business. As a result, all partners were responsible for the bank's losses. This was in accordance with ss 11, 12 and 14 of the Partnership Act 1961 (see paras 134–135).

[Bahasa Malaysia summary

Plaintif ('bank') merupakan sebuah institusi kewangan manakala defendan-defendan ('peguamcara-peguamcara/firma guaman tersebut') merupakan rakan kongsi dalam sebuah firma guaman yang dikenali sebagai Messrs Lua & Mansor yang dilantik oleh bank untuk mewakilinya dan pernah berkhidmat dalam panel peguam bank. Dalam kes semasa, bank mendakwa bahawa peguamcara-peguamcara tersebut telah melanggar kontrak dan/atau tugas profesional mereka kepada bank serta cuai dalam melindungi kepentingan bank, yang merupakan tujuan utama bank melantik mereka. Pertikaian ini berpunca daripada kemudahan pinjaman ('kemudahan tersebut') yang diberikan oleh bank kepada sebuah syarikat yang dikenali sebagai Sparrows & Arrows Sdn Bhd ('Sparrows') yang dijamin oleh jaminan yang diberikan oleh Chew Nee Hee ('CNH') dan Ling Yun Yoke ('LYY') serta penyerahan hak bagi sebuah hartanah di Megan Avenue II ('hartanah Megan'). Apabila Sparrows gagal membuat pembayaran yang berkaitan di bawah kemudahan tersebut, bank mengarahkan peguamcara-peguamcara tersebut untuk memfailkan tindakan terhadap Sparrows dan penjamin-penjamin tersebut, dan tindakan tersebut berakhir dengan memihak kepada bank ('penghakiman tersebut'). Bank kemudian mengarahkan peguamcara-peguamcara tersebut untuk meneruskan lelongan awam hartanah Megan pada harga rizab RM1.8 juta. Sementara menunggu lelongan awam, atas permintaan CNH, pihak-pihak memasuki perjanjian penyelesaian ('penyelesaian Shah Alam') berhubung dengan penghakiman tersebut tetapi usaha tersebut sia-sia. Selain itu, terdapat juga cadangan oleh LYY bahawa penghakiman dan/atau penyelesaian Shah Alam dibayar daripada hasil lelongan awam yang akan dibuat ke atas hartanah LYY yang terletak di Damansara ('hartanah Damansara'). Setelah itu, berdasarkan pemahaman bahawa bank telah mencapai persetujuan dengan LYY bahawa jumlah yang perlu dibayar di bawah penyelesaian Shah Alam akan dibayar kepada bank

daripada hasil lelongan hartanah Damansara, Sparrows menjual hartanah Megan kepada Koperasi Kakitangan Petronas Bhd ('Kopetro') dan meminta kerjasama bank untuk menarik balik lelongan hartanah Megan yang belum selesai. Apabila bank enggan berbuat demikian, Sparrows memfailkan tindakan terhadap bank ('Tindakan 314') dan berjaya memperoleh, antara lain, yang berikut: (a) injunksi untuk menghalang lelongan hartanah Megan; (b) perintah mahkamah yang membenarkan Sparrows menjual hartanah Megan kepada Kopetro; dan (c) satu deklarasi bahawa pihak-pihak telah mempersetujui bahawa jumlah RM1.8 juta tersebut akan diselesaikan daripada hasil lelongan awam yang dijalankan pada 17 Mac 2011 di mana hartanah Damansara telah dijual dengan harga RM3.8 juta (lelongan awam tersebut adalah berdasarkan perintah larangan yang diperoleh oleh sebuah syarikat yang dikenali sebagai Gale Force Sdn Bhd terhadap hartanah Damansara). Bank telah merayu terhadap keputusan mahkamah dalam Tindakan 314 ('Rayuan 314') tetapi sementara menunggu penyelesaian rayuan tersebut, Sparrows telah pun memindahkan hartanah Megan kepada Kopetro pada 22 Jun 2012. Seterusnya, Rayuan 314 dibenarkan tetapi Mahkamah Rayuan tidak membuat apa-apa perintah berbangkit berhubung dengan hartanah Megan. Peguamcara, yang bertindak bagi pihak bank, kemudiannya memfailkan tindakan undang-undang baharu terhadap Sparrows, Kopetro dan rakan kongsi peguamcara kedua Sparrows tetapi tindakan tersebut tidak berjaya. Rayuan bank ('Rayuan 413') juga mengalami nasib yang sama. Dalam hal ini, mahkamah rayuan dalam Rayuan 413 mendapati bahawa: (i) tuntutan bank telah dihalang oleh had masa; dan (ii) saman bank telah dihalang oleh prinsip res judicata. Berbalik kepada tindakan semasa, bank telah memohon relif-relif berikut terhadap peguamcara-peguamcara tersebut: (A) ganti rugi berjumlah RM526,383.09; (B) ganti rugi yang akan ditaksirkan oleh mahkamah; (C) faedah; (D) ganti rugi am; dan (E) kos. Isu-isu awal yang timbul dalam tindakan semasa adalah seperti berikut: (1) sama ada tindakan bank telah dihalang oleh had masa; (2) sama ada terdapat ketidakpatuhan dengan A 77 Kaedah-Kaedah Mahkamah 2012 yang dibaca bersama Akta Perkongsian 1961; (3) sama ada terdapat unsur-unsur res judicata, pilihan atau penduaan prosiding dalam saman yang difailkan oleh bank; (4) sama ada bank boleh berjaya berdasarkan keterangan seorang saksi yang didakwa tidak mempunyai pengetahuan peribadi tentang kes semasa — dalam hal ini, bank hanya memanggil PW1 yang merupakan ahli dalam pasukan Pengurusan Pemulihan Korporat Wilayah Persekutuan bank tersebut; dan (5) sama ada bank boleh mengekalkan tindakan di bawah pelanggaran kontrak dan kecuaian profesional bersama-sama. Isu-isu penting yang perlu ditentukan oleh mahkamah adalah: (I) sama ada kerugian yang dialami adalah disebabkan oleh pelanggaran oleh bank sendiri ditambah pula dengan fakta bahawa pihak-pihak mematuhi perintah mahkamah yang sah; (II) sama ada tanggungjawab firma guaman tersebut terhadap bank terhad kepada perkara litigasi memandangkan firma guaman tersebut hanya berada

dalam panel litigasi bank; dan (III) sama ada semua rakan kongsi firma guaman berkenaan bertanggungjawab.

Diputuskan, membenarkan tuntutan bank terhadap peguamcara-peguamcara dengan kos sebanyak RM50,000, tertakluk kepada alokatur:

(1) Bank mengalami kerugian hanya apabila hartanah Megan dipindahkan kepada Kopetro pada 22 Jun 2012. Oleh itu, tempoh had masa enam tahun hanya akan bermula dari tarikh tersebut. Oleh itu, apabila bank memulakan tindakan semasa pada 23 April 2018, ia berada dalam tempoh masa di bawah s 6 Akta Had Masa 1953. Tambahan pula, firma guaman tersebut mempunyai tanggungjawab berterusan untuk melindungi kepentingan bank sepanjang penglibatannya sehingga hartanah Megan dipindahkan kepada Kopetro. Atas dasar inilah tindakan bank terhadap peguamcara-peguamcara tersebut bermula. Sebelum peristiwa ini, bank tidak mengalami apa-apa kerugian (lihat perenggan 61–62).

(2) Memandangkan keadaan dan sejarah pertikaian semasa, khususnya hubungan antara pihak-pihak, ketiadaan intitulement khusus untuk menamakan dan menyaman peguamcara-peguamcara tersebut secara nyata, perkongsian dalam tajuk tindakan dengan menyatakan secara jelas 'didakwa sebagai rakan kongsi Messrs Lua & Mansor' tidak akan menjadi kecacatan asas dalam kausa tindakan bank, dan juga tidak akan menjejaskan keseluruhan asas tuntutan bank. Dalam hal ini, mahkamah mendapati bahawa pernyataan tuntutan terpinda yang membentuk pembelaan bank, bukan sahaja mengenal pasti peguamcara-peguamcara tersebut dengan jelas sebagai rakan kongsi dalam Messrs Lua & Mansor pada setiap masa yang material tetapi juga menunjukkan peranan rakan kongsi serta liabiliti firma guaman tersebut sekiranya bank berjaya membuktikan tuntutannya. Selain mengenal pasti inti pati kausa tindakan yang didakwa, bank juga telah mengemukakan tuntutannya terhadap peguamcara-peguamcara tersebut dengan terperinci (lihat perenggan 67 & 69).

(3) Pada hakikatnya, semua saman terdahulu berbeza dari segi fakta asas yang ditangani, berbanding dengan kausa tindakan dan pihak yang terlibat dalam kes semasa. Selain itu, mahkamah mendapati bahawa beberapa isu dalam saman semasa tidak pernah dibangkitkan atau diplid sebelum ini. Seperti yang dapat dilihat daripada pemeriksaan terperinci ke atas Rayuan 413, terdapat isu yang berkaitan dengan pembeli bona fide sebenar untuk nilai yang dibangkitkan oleh pihak-pihak di dalamnya, sedangkan tiada elemen sedemikian dalam kes semasa. Tindakan semasa semata-mata berkaitan dengan tindakan dan peninggalan peguamcara-peguamcara tersebut dalam bertindak bagi pihak bank. Oleh itu, bank tidak menyalahgunakan apa-apa proses undang-undang

atau melanggar apa-apa peraturan res judicata atau estoppel. Oleh itu, tidak wujud juga keadaan pertindihan atau kepelbagaian prosiding (lihat perenggan 73, 75 & 77).

(4) Mahkamah mendapati bahawa tindakan semasa adalah kes di mana pertikaian banyak berdasarkan dokumentasi yang kewujudannya tidak dipertikaikan dengan ketara oleh mana-mana pihak. Oleh yang demikian, mahkamah tidak dikehendaki mentafsirkan makna atau tafsiran dokumen atau perjanjian yang terlibat dalam pertikaian semasa. Oleh itu, kedudukan PW1 sebagai saksi boleh diterima dalam kes semasa, tertakluk kepada pembuktian keterangan di atas imbangan kebarangkalian. Untuk tujuan ini, dokumen yang tidak dipertikaikan itu sendiri bercakap mengenai keadaan sekeliling dan bukannya pemahaman atau ingatan saksi yang tepat tentang peristiwa tersebut. Berkenaan dengan kegagalan bank memanggil saksi pakar, adalah jelas daripada pendedahan fakta bahawa isu utama yang mendasari kes semasa tidak cukup kompleks untuk memerlukan keterangan pakar. Tambahan pula, tiada dakwaan bahawa bank menyembunyikan atau menahan keterangan. Oleh itu, tiada asas untuk membuat inferens bertentangan berdasarkan s 114(g) Akta Keterangan 1950 (lihat perenggan 82–84, 87 & 89).

(5) Berdasarkan keputusan Mahkamah Persekutuan dalam kes *Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor* [2024] 3 MLJ 544, mahkamah berpendapat bahawa tindakan tort dan kontrak bukanlah eksklusif antara satu sama lain dan kedua-duanya boleh wujud bersama (lihat perenggan 100).

(6) Mahkamah mendapati bahawa penjualan hartanah tersebut kepada Kopetro dan pemindahan yang dilaksanakan ke atasnya mengakibatkan pelanggaran bukan sahaja bagi tort kecuaian yang mengawal hubungan antara pihak-pihak dalam kes semasa tetapi juga hubungan kontraktual apabila firma guaman dan peguamcara-peguamcara yang berkaitan gagal bertindak mengikut kontrak retainer, sama ada secara tersurat atau tersirat. Ini dibuktikan oleh fakta bahawa bank sentiasa mengarahkan firma guaman tersebut untuk merealisasikan cagaran yang diberikannya melalui lelongan awam. Akibatnya, terdapat kewajipan ke atas firma guaman tersebut untuk mengambil semua langkah munasabah yang akan diambil oleh peguamcara yang berhemat apabila diarahkan untuk bertindak sedemikian. Dalam hal ini, mahkamah mendapati bahawa bank yang telah diberikan serahan mutlak oleh peminjam ke atas hartanah bercagar melalui 'loan agreement cum assignment' ('LACA'), seperti dalam kes semasa, berhak untuk merealisasikan cagarannya melalui penjualan persendirian. Atas sebab ini, bank tidak perlu membuat gadaian sebelum merealisasikan cagarannya. Begitu juga, bank juga berhak untuk mengadakan lelongan awam mengikut LACA

walaupun gadaian tersebut tidak didaftarkan (lihat perenggan 117–118 & 123).

(7) Tambahan pula, mahkamah bersetuju dengan pendirian bank bahawa firma guaman tersebut yang mengetahui bahawa hak milik strata telah dikeluarkan untuk hartanah tersebut dan bank tidak mendaftarkan gadaiannya, sepatutnya boleh menjangkakan dengan sewajarnya risiko yang berkaitan dengan situasi di mana dokumen hak milik terbitan berada di tangan dan didaftarkan atas nama pemaju. Ini seterusnya boleh menyebabkan bank kehilangan kawalan ke atas hartanah Megan, seperti yang berlaku dalam kes semasa. Mahkamah berpendapat bahawa risiko yang jelas harus sentiasa dibawa kepada perhatian klien oleh peguam cara (lihat perenggan 120 & 122).

(8) Setakat yang berkaitan dengan perlindungan kepentingan klien, tanggungjawab peguamcara untuk bertindak bagi pihak klien mereka melangkaui bidang amalan mereka. Jelas sekali, peguamcara bertanggungjawab untuk melindungi kepentingan pelanggan mereka pada setiap masa. Dalam kes semasa, apabila firma guaman tersebut dilantik oleh bank untuk pemulihan pinjaman in personam dan, yang lebih penting, untuk merealisasikan hartanah Megan in rem, firma guaman tersebut secara automatik memikul tanggungjawabnya dalam kapasiti profesionalnya untuk melindungi kepentingan bank bukan sahaja dalam mendapatkan semula pinjaman yang diambil oleh Sparrows dan penjamin-penjaminnya tetapi juga dalam memastikan bahawa hartanah Megan dilindungi supaya bank boleh mendapatkan semula wang pinjaman tersebut daripada cagaran tersebut (lihat perenggan 127–128).

(9) Berkenaan kedudukan rakan kongsi firma tersebut, berdasarkan analisis oleh mahkamah ke atas fakta dan undang-undang, adalah jelas bahawa semua defendan yang merupakan rakan kongsi firma guaman tersebut bertanggungjawab secara bersama dan berasingan atas semua tindakan dan peninggalan firma guaman tersebut dan/atau mana-mana peguam yang bertindak dalam urusan biasa perniagaan mereka. Akibatnya, semua rakan kongsi bertanggungjawab atas kerugian bank. Ini adalah selaras dengan ss 11, 12 dan 14 Akta Perkongsian 1961 (lihat perenggan 134–135).]

Cases referred to

Arumugam Pillai v Government of Malaysia [1980] 2 MLJ 283; [1980] 1 LNS 3, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Bank Utama (M) Bhd v Insan Budi Sdn Bhd [2009] 1 MLJ 148; [2009] 1 CLJ 221, CA (refd)

Bell v Peter Browne & Co [1990] 2 QB 495, CA (refd)
Bungsar Hill Properties SB & Anor v Puspambekhai d/o Ramanathan [1999] MLJU 316; [1999] 8 CLJ 67, HC (refd)
CIMB Islamic Bank Bhd v Khairuddin bin Abu Hassan [2021] 2 MLJ 155; [2021] 4 CLJ 375, CA (refd)
Credit Guarantee Corporation Malaysia Berhad v SSN Medical Products Sdn Bhd [2016] MLJU 1304; [2017] 6 CLJ 129, CA (refd)
Damai Freight (M) Sdn Bhd v Affin Bank Bhd [2015] 4 MLJ 149, FC (refd)
Edward Wong Finance Co Ltd v Johnson Stokes & Master (A Firm) [1984] AC 296, PC (refd)
Elinoil-Hellenic Petroleum Co SA v Wee Ramayah & Partners [1999] SCD 136; [1999] 1 SLR(R) 977, HC (refd)
Gale Force Sdn Bhd v Ling Yun Yoke (Malayan Banking Bhd, intervener) [2012] MLJU 1, HC (refd)
Henderson & Ors v Merrett Syndicates Ltd & Ors [1994] 3 All ER 506, HL (refd)
Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor [2024] 3 MLJ 544, FC (folld)
Lai Foh & Sons Sdn Bhd v Skrine & Co (didakwa sebagai sebuah firma) [2001] MLJU 250; [2001] 3 CLJ 185, HC (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)
Lim Soh Wah & Anor v Wong Sin Chong & Anor and another appeal [2001] MLJU 771; [2001] 2 CLJ 344, CA (folld)
Loh Bee Juan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd & Ors [2002] 2 MLJ 532, HC (refd)
Megat Najmuddin bin Megat Khas & Ors v Perwira Habib Bank Malaysia Berhad [2003] 4 MLJ 65, CA (refd)
Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 571, Ch D (refd)
Mohd Raffi bin Abdullah v Kumaresan a/l K Naggiah & Anor [2019] MLJU 2071; [2019] 1 LNS 1673, HC (refd)
Mulpha Kluang Maritime Carriers Sdn Bhd v Philip Koh Tong Ngee & Ors [2016] 10 MLJ 517; [2015] 8 CLJ 555, HC (refd)
Neogh Soo Oh & Ors v G Rethinasamy [1984] 1 MLJ 126; [1983] 2 CLJ 218 (refd)
Ng Bee Ken Kenny (an advocate and solicitor practicing under the name and style of Messrs Azri, Lee Swee Seng & Co) v Tan Yee Shen & Anor [2022] 2 MLJ 385, CA (refd)
OCBC Bank (Malaysia) Berhad v Kok Weng Tuck & Ors [2015] MLJU 2040; [2015] 1 LNS 1336, HC (refd)
Ong Guek Siang & Anor v Asset First Sdn Bhd & Anor [2012] 10 MLJ 61, HC (refd)

A *Saamah Saruan v Norhisham Tahir & Ors* [2011] MLJU 1571; [2010] 1 LNS 1595, HC (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others [1985] 2 All ER 947, PC (refd)
Victor Cham & Anor v Loh Bee Tuan [2006] 5 MLJ 359, CA (refd)
B *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39, FC (refd)

Legislation referred to

C Civil Law Act 1956 s 5
Evidence Act 1950 s 114(g)
Financial Services Act 2013
Land Acquisition Act 1960
Land Changes Act 1925 [UK]
D Limitation Act 1953 s 6
Partnership Act 1961 ss 11, 12, 14
Rules of Court 2012 O 77, O 77 rr 1, 2

Ng Sai Yeang (with Yenne Chow and Mark La Brooy) (Raja, Darryl & Loh) for the plaintiff.
E *Russell Lua Kok Hiyong (with Ummi Salhah bt Mohamad) (Lua & Mansor) for the defendants.*

Raja Ahmad Mohzanuddin Shah J:

F PRELIMINARY

[1] 'Law is order, and good law is good order' — Aristotle.

G **[2]** In light of the above quote, the law is the most fundamental foundation of society, without which no society can function. As one aspect of achieving this, clients always need solicitors to protect and defend their interests, whether it is for their organisations or personal matters. Ultimately, one cannot exist without the other.

H

[3] The dispute before me arises from the above rationale. It emerges from an earlier relationship between the plaintiff as a financial institution ('the bank') and the defendants ('the solicitors/legal firm') who were partners in a law firm retained by the bank to represent it and once served on the bank's panel of
I lawyers.

[4] There are now allegations by the bank that the solicitors breached their contract and/or professional duties to it as well as negligently failed to protect

the bank's interests, which was the very purpose for which the bank appointed the legal firm.

[5] To that end, the bank seeks the following relief against the solicitors in this action:

(a) damages in the sums of RM526,383.09;

(b) damages to be assessed by the court;

(c) interest on the damages awarded at 5%pa from 4 April 2018 or from the date of the writ herein or the date of judgment or such date as the court deems fit until the date of full settlement;

(d) general damages; and

(e) costs.

[6] As expected, the solicitors vigorously resisted these allegations.

AN OVERVIEW OF THE FACTS OF THE CASE

[7] As for the facts of the case, I must admit that they are not rather straightforward facts that led to the allegations by the bank. Nevertheless, the parties' conduct in preparing the agreed facts is exemplary. In this regard, both parties have agreed on extensive facts during the pre-trial case management process.

[8] The following facts, on which I am heavily relying in making my decision, are reproduced with their agreement.

[9] The bank is a licensed banking institution incorporated in Malaysia under the Financial Services Act 2013.

[10] The solicitors were at all material times partners at the firm of advocates and solicitors known as Messrs Lua & Mansor with offices in Petaling Jaya, Selangor and Kota Bharu, Kelantan.

[11] In 1996, the bank granted Sparrows & Arrows Sdn Bhd ('Sparrows') a term loan facility of RM1.2m ('the facility') evidenced by, inter alia, the following:

(a) the bank's letter of offer dated 17 October 1996; and

(b) a loan agreement cum assignment dated 23 April 1997,

both of which were prepared by the firm of advocates and solicitors known as Messrs Kassim Tadin Wai & Co

[12] The facility was secured by, inter alia, the following:

(a) a joint and several guarantee by Chew Nee Hee ('CNH') and Ling Yun Yoke ('LYY') ('the guarantors'); and

(b) an assignment over the property known as Unit No B-05-G, Ground Floor, Block B, Megan Avenue II held under strata title registered as Geran 37731/M1-B/1/64, Lot No 144, Seksyen 44, Daerah Kuala Lumpur, Bandar Kuala Lumpur ('the Megan property').

[13] On 7 April 2003, the strata title to the Megan property was issued and registered in the name of AAB Avenue Sdn Bhd, the developer of the Megan property ('the developer').

[14] Sparrows defaulted in its obligations under the facility.

[15] On 16 February 2006, the bank instructed the legal firm to:

(a) file action against Sparrows and the guarantors to recover the sums due under the facility; and

(b) 'KIV' the foreclosure proceedings on the Megan property as the bank was 'in the midst of perfecting the charge documents'.

[16] On 18 April 2006, the legal firm acting for the bank commenced legal action against Sparrows and the guarantors vide Shah Alam High Court Civil Suit No MT1-22–421–2006 ('the Shah Alam action').

[17] On 2 April 2008, the bank obtained judgment in the Shah Alam action against Sparrows and the guarantors ('the judgment').

[18] On 1 September 2009, the bank sought the legal firm's advice on whether the Megan property could be sold by auction, without having to create a charge over the Megan property. At the material time, the legal firm advised that the bank should take a transfer and execute a charge over the Megan property before selling it through a public auction.

[19] On 18 October 2010, the bank instructed the legal firm to proceed with public auction of the Megan property at a reserve price of RM1.8m.

[20] On 26 October 2010, CNH sought a settlement in respect of, inter alia, Sparrows' account No 414570202078 and/or the judgment and the bank

proposed terms and conditions in the bank's letter dated 28 October 2010 ('the Shah Alam settlement') which terms were, inter alia, as follows:

(a) the upfront payment of RM90,000 which was received from CNH and deposited into Sparrows' term loan account No 414570202078;

(b) the balance sum of RM1.71m to be fully settled within 150 days from 28 October 2010 (ie by 29 March 2011); and

(c) in the event CNH fails to settle the balance sum by 29 March 2011, the upfront payment will be forfeited and the bank will exercise its rights.

[21] In light of the Shah Alam settlement, on 29 October 2010, the bank instructed the legal firm to, inter alia, withhold all legal proceedings.

[22] Separately, on 22 February 2011, LYY proposed for the bank to consolidate the sums under five different accounts with the bank, where there were sums owed to the bank. LYY also proposed that the judgment and/or the Shah Alam settlement be payable from the proceeds of the public auction to be held over the property known as No 41, Jalan Setiabakti, Bukit Damansara, 50490 Kuala Lumpur ('the Damansara property').

[23] On 7 March 2011, the bank instructed that the legal firm proceeds to obtain the adjudication order and receiving order ('AO and RO') against CNH at the upcoming hearing date as the bank was informed that the Shah Alam settlement may not be adhered to.

[24] On 9 March 2011, the bank informed LYY that the said five different accounts have been consolidated and that the bank would respond to the rest of LYY's proposal in due course.

[25] On 23 March 2011, the bank also instructed the legal firm to, inter alia, withhold bankruptcy proceedings against LYY.

[26] On 28 March 2011, LYY sought an extension of time to make payment under the Shah Alam settlement.

[27] On 31 March 2011, the bank rejected the request for an extension of the time to make payment under the Shah Alam settlement.

[28] On 31 March 2011, the bank instructed the legal firm to proceed with the public auction of the Megan property. The public auction of the Megan property was fixed on 19 April 2011.

[29] On 11 April 2011 and 12 April 2011, in two separate letters, Messrs

Wang & Co, the then solicitors for Sparrows ('Sparrows' first solicitors') informed the legal firm, inter alia, that Sparrows had sold the Megan property and executed a sale and purchase agreement dated 12 November 2010 with one Koperasi Kakitangan Petronas Bhd ('Kopetro') for the sum of RM3.85m ('the SPA') and that Sparrows had received a deposit of RM977,000.

[30] Sparrows' first solicitors also informed the legal firm that it (being Sparrows' first solicitors) was made to understand that the bank had reached an agreement with LYY that the sums due under the Shah Alam settlement was to be paid to the bank from the proceeds of the auction of the Damansara property. Sparrows' first solicitors also sought that the bank withdraw the pending auction of the Megan property, failing which Sparrows would take an injunction against the bank.

[31] On 13 April 2011, the bank provided the legal firm a brief chronology of events of the attempts made to settle the outstanding debts owed to the bank.

[32] On 15 April 2011, Sparrows and LLY commenced an action against the bank vide Kuala Lumpur High Court Civil Suit No 22NCVC-314 of 2011 ('the 314 action') seeking, inter alia, a declaration that the bank had accepted a sum of RM 1.8m as full and final settlement of the judgment under the Shah Alam action and that the SPA was to be proceeded with.

[33] The legal firm represented the bank in the 314 action.

[34] On 18 April 2011, the High Court in the 314 action granted an injunction to restrain the auction of the Megan property.

[35] On 22 June 2011, the High Court in the 314 action granted an interim order by consent, whereby Sparrows was allowed to sell the Megan property to Kopetro.

[36] On 31 January 2011, a company by the name of Gale Force Sdn Bhd obtained a prohibitory order vide Kuala Lumpur High Court Execution Proceedings A/E No 36–11 of 2010 over the Damansara property to recover the sums owed by LYY ('Gale Force execution').

[37] On 17 March 2011, under the Gale Force execution, the Damansara property was sold via auction for RM3.8m.

[38] On 19 July 2011, the bank had a meeting with the legal firm together with, inter alia, other solicitors acting for the bank at that time.

[39] On 10 October 2011, under the Gale Force execution, the court ordered the manner in which the proceeds of the sale of the Damansara property was to be utilised which was, inter alia, as follows:

(a) firstly, the sum of RM3,381.96 to be paid to the relevant authority(ies) being payment for quit rent and assessment in respect of the Damansara property;

(b) secondly, the following sums to be paid in connection with the costs and expenses relating to the auction of the Damansara property;

(c) thirdly, payment in the sum of RM1,633,537.73 to be paid to the bank in respect of the two term loan accounts No 414339200112 and No 414329200105 to release the charge over the Damansara property;

(d) fourthly, the balance of the proceeds of the sale, following the deduction of the sums under para (b) above, to be paid to Gale Force Sdn Bhd, towards settlement of the sums owed under the judgment dated 22 December 2009 which as at 17 March 2011 was in the sum of RM3,022,624.75 and which continued to accrue; and

(e) lastly, following the full settlement of the judgment dated 22 December 2009, the balance, if any, to be paid to LYY.

[40] On 24 October 2011, the High Court in the 314 action made, inter alia, the following orders in favour of Sparrows and LYY:

(a) a declaration that it had been agreed between parties that the sum of RM1.8m is full and final settlement of the judgment obtained by the bank;

(b) a declaration that it was agreed between parties that the sum of RM1.8m is to be settled from the proceeds of the public auction carried out on 17 March 2011 in which the Damansara property was sold for a sum of RM3.8m;

(c) that the sale of the Megan property to Kopetro under the SPA be completed within three months from the date of the order; and

(d) that parties be at liberty to apply,
('the 314 judgment').

[41] On 31 October 2011, the legal firm advised that the bank appeal the 314 judgment.

[42] On 02 November 2011, the legal firm informed Messrs Nga Hock Cheh & Co, the solicitors for Sparrows and LYY ('Sparrows' second solicitors'), that the bank may lodge an appeal against the 314 judgment. the legal firm also sought for compliance with the 314 judgment.

[43] On 21 November 2011, the legal firm lodged a notice of appeal to the Court of Appeal vide Court of Appeal Civil Appeal No W-02NCVC-2962–11 of 2014 ('the 314 Appeal') in respect of the 314 judgment.

[44] On 18 April 2012, the legal firm advised that the bank was entitled to sell the Megan property by way of public auction.

[45] On 2 May 2012, the bank instructed the legal firm to proceed to auction the Megan property.

[46] On or around 22 June 2012, the Megan property was transferred to and registered in the name of Kopetro and a charge was registered in favour of CIMB Bank Bhd ('CIMB').

[47] On 3 July 2012, the Court of Appeal allowed the 314 Appeal. The Court of Appeal did not make any consequential order in relation to the Megan property.

[48] On 13 January 2014, Sparrows was ordered to be wound up.

[49] On 17 July 2014, the legal firm, acting for the bank, commenced legal action against Sparrows, Kopetro and the partners of Sparrows' second solicitors vide Kuala Lumpur High Court Civil Suit No 22NCVC-361–07 of 2014 ('the new action').

[50] On 23 February 2017, the High Court dismissed the new action and ordered the bank to pay costs in the aggregate sum of RM4m.

[51] On 28 February 2017, the bank appealed against the decision in the new action via Court of Appeal Civil Appeal No W-02NCVC-(W)-413–03 of 2017 ('the new appeal').

[52] On 19 August 2021, the Court of Appeal dismissed the new appeal with costs.

ISSUES TO BE TRIED

[53] The parties have raised several issues to be tried, most of which were uncommon at that stage of the filing process. Despite this, as the arguments developed, the parties mostly addressed the same issues, though from different angles.

[54] For the purposes of these grounds of judgment, I will only highlight the

most important and vital issues that I believe would be relevant and sufficient to explain my findings and reasoning regarding this dispute.

[55] The subsequent analysis and findings will address these issues in two categories, preliminary issues and substantial issues.

COURT'S ANALYSIS AND FINDINGS

[56] For a proper determination of the dispute between the parties, I must conduct a balancing exercise between the two positions offered to me by the parties and determine to which side the balance of probabilities tilted. Each party has presented their own version. My task is to determine which is more probable based on my understanding of the facts and applicable laws.

Preliminary issues

[57] To begin with, the solicitors raised a few preliminary issues and objections that warrant initial consideration before deciding whether to proceed with determining the substantive arguments on the merits of the case as a whole.

[58] The basis for some of them will be discussed at this point. It is interesting to note that some were raised later in the proceedings. I will, however, only address those that are crucial.

Whether the bank's action is time-barred?

[59] The first is the limitation period.

[60] On this matter, the solicitors argue that the bank's action is time-barred due to the findings of Her Ladyship Lau Bee Lan JCA in Appeal 413, which ruled that the bank's cause of action was triggered by Sparrows entering into the SPA with Kopetro on 12 November 2010. Accordingly, since the bank's claim against Kopetro has been ruled statute-barred, that ruling extends to this suit when the bank also seeks similar damages against the solicitors on the basis of the same Megan Property.

[61] Regarding this issue, I conclude that the bank suffered a loss only when the Megan property was transferred to Kopetro on 22 June 2012. Therefore, the six-year limitation period would only begin to run from that date. Thus, when the bank initiated this action on 23 April 2018, it was well within the timeframe under s 6 of the Limitation Act 1953.

[62] Moreover, the legal firm had a continuing duty to protect the bank's interests throughout its engagement until the Megan property was transferred to Kopetro. It was on this basis that the bank's cause of action against the solicitors began. Prior to this event, the bank had not suffered any losses.

[63] An almost similar issue of limitation was also raised in *Ng Bee Ken Kenny (an advocate and solicitor practicing under the name and style of Messrs Azri, Lee Swee Seng & Co) v Tan Yee Shen & Anor* [2022] 2 MLJ 385. In this case, the plaintiffs entered into a sale and purchase agreement ('SPA') for the purpose of purchasing a property and appointed the defendant to manage and complete the conveyancing process. As a result of the defendant's delay, the SPA could not be completed as the vendor was wound up on 24 July 2001. This situation was further complicated by the failure and/or neglect of the defendant to enter the caveat over the property. As a result, the vendor's financier sold the property at public auction on 16 February 2006. The Court of Appeal's judgment on this issue was delivered by His Lordship Nantha Balan JCA, who remarked at pp 426–427 that the earliest time the plaintiffs could commence a negligence action was 16 February 2006, since the cause of action commenced on that day:

> [104] Hence, applying the principle which was enunciated in the *Ambank*'s case to the facts in this case, it is clear that 16 February 2006 is the earliest point in time that the plaintiffs could have commenced an action in negligence as the cause of action commenced on that date. The damage occurred on that date because thereafter it was legally impossible to complete the SPA. The six years limitation period for an action in tort per s 6(1)(a) of the Limitation Act 1953 would therefore have ended on 15 February 2012. However, the present suit was only filed on 9 August 2012. On that analysis, Suit 943 is plainly time barred.
>
> ...
>
> [108] Lastly, we note that the judge had made a finding that the action was not time-barred because the plaintiffs' claim was premised on events that occurred prior to the plaintiffs' loss of the property which crystallised on 16 February 2006. If that be the case, then the issue of time-bar is even more compelling as anything that happened prior to 16 February 2006 would make the issue of time-bar even more egregious. The judge had therefore erred in her analysis of the issue of limitation.

Whether there was a non-compliance with O 77 of the Rules of Court 2012 read together with the Partnership Act 1961?

[64] the solicitors named as defendants herein, who are partners of the legal firm, argue that since their Legal Firm has not been specifically sued in these proceedings, it is not a party to the suit. As a result, O 77 of the Rules of Court 2012 ('the RC 2012'), read in conjunction with the Partnership Act 1961, was not complied with. As the solicitors are being sued as individuals rather than the legal firm as a whole, the legal firm cannot be held liable, they claim.

[65] As a starting point, O 77 rr 1 and 2 of the RC 2012 states:

> Action by and against firms within jurisdiction (O 77 r 1)
>
> Subject to the provisions of any written law, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue or be sued, in the name of the firm, if any, of which they were partners at the time when the cause of action accrued.
>
> Disclosure of partners' names (O 77, r 2)
>
> 2(1) Any defendant to an action brought by partners in the name of a firm may serve on the plaintiffs or their solicitor a notice requiring them or him forthwith to furnish the defendant with a written statement of the names and places of residence of all the persons who were partners in the firm at the time when the cause of action accrued and if the notice is not complied with the Court may order in Form 190 the plaintiffs or their solicitor to furnish the defendant with such a statement and to verify it on oath or otherwise as may be specified in the order, or may order that further proceedings in the action be stayed on such terms as the Court may direct.
>
> (2)When the names of the partners have been declared in compliance with a notice or an order given or made under paragraph (1), the proceedings shall continue in the name of the firm but with the same consequences as would have ensued if the persons whose names have been so declared had been named as plaintiffs in the writ.
>
> (3) Paragraph (1) shall have effect in relation to an action brought against partners in the name of a firm as it has effect in relation to an action brought by partners in the name of a firm but with the substitution, for references to the defendant and the plaintiffs, of references to the plaintiff and the defendants respectively, and with the omission of the words 'or may order' to the end.

[66] The following is my viewpoint on this matter.

[67] Considering the circumstances and history of this dispute, specifically the relationship between the parties, the absence of a specific intituiement to expressly name and specifically sue the solicitors, partnership in the title of the action by explicitly stating 'sued as partners of Messrs Lua & Mansor' would not constitute a fundamental flaw in the bank's cause of action, nor would it undermine the entire foundation of the bank's claim.

[68] Based specifically on the facts before me, the exclusion of such a specific party, as suggested by the solicitors, did not in any way compromise the bank's rights or ability to pursue its claim against the solicitors as partners of the law firm, nor did it undermine the bank's cause of action.

[69] In this regard, I find that the amended statement of claim dated 20 April 2018, which constitutes the bank's pleadings, not only clearly identifies the solicitors as partners at Messrs Lua & Mansor at all material times but also

indicates the roles of the partners as well as the legal firm's liability in the event the bank succeeds in proving its claims. In addition to identifying the ingredients of its alleged cause of action, the bank has also set forth its claim against the solicitors in adequate detail.

[70] Additionally, the solicitors argue that from their point of view, there is an existence of a strategic approach in their argument. This is because in order to empower the winning party to smoothly execute the judgment without encountering any limitations or hiccups, it is vital for the legal firm to be named as a party or naming the solicitors trading as partners of the legal firm.

[71] As for this very specific issue, I find that this is not a life issue for me to decide. To this end, how the successful party intends to execute is the least of my concerns at this point. For that matter, this argument may have been in the solicitors' favour, but it is premature to take up this issue at this time.

Whether there are elements of res judicata, election or duplicity of proceedings in the bank's suit?

[72] Having relied on Her Ladyship Lau Bee Lan JCA's ruling in Appeal 413 that held the bank's suit therein was estopped by the principle of res judicata in the wider sense because the bank failed to counterclaim in Suit 314, the solicitors argue that the same conclusion must be applied to this current suit as well.

[73] Although the above finding in Appeal 413 undoubtedly has some basis, I believe that the issues in this current suit have been properly raised. This is due to the differences between the current suit and the earlier suits. While the issues herein still concern the same subject matter involving similar property, the facts and complaints herein are somehow distinct. As can be seen from a closer examination of Appeal 413, there was an issue relating to an actual bona fide purchaser for value raised by the parties therein, whereas there is no such element in this current matter.

[74] In this respect, it is crucial not to lose sight of the fact that the legal firm was retained to safeguard the bank's interests. Thus, once all the other decisions in the earlier suits have been made and each factual circumstance disclosed, the bank is not prevented from assessing and analysing the positions and thereafter coming to the alleged conclusion that a breach of contract and/or professional negligence has occurred.

[75] As a matter of fact, all those earlier suits differ in the underlying facts they address, as opposed to the causes of action and parties involved herein. Additionally, I find that some of the issues in this current suit have never before

been raised or pleaded. As far as my decision herein is concerned, this present action is solely concerned with the solicitors' actions and omissions in the course of acting on behalf of the bank.

[76] In addition, it must also be taken into consideration of the fact that the solicitors represented the bank and protected its interests for almost a decade. In this period, the bank relied on the solicitors to resolve the relevant disputes.

[77] Therefore, the bank did not abuse any legal process or violate any rule of res judicata or estoppel. As such, there are also no instances of duplication or multiplicity of proceedings.

[78] In *Bungsar Hill Properties SB & Anor v Puspambekhai d/o Ramanathan* [1999] MLJU 316; [1999] 8 CLJ 67, Her Ladyship Rahmah Hussain J distinguished between the causes of action of existing and previous actions, and distinguished the Supreme Court case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783. These are Her Ladyship's observations at pp 71, 72 and 73:

> So, what is res judicata? The law on this plea had been clearly expounded by the Supreme Court in the recent case of *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783; [1995] 3 AMR 2559.
>
> Res judicata means a matter adjudged; its significance lies in its effect of creating an *estoppel per rem judicatum*. When a matter between two parties has been adjudicated by a court, the parties are not permitted to litigate the matter again, because the judgment becomes the truth between them. The public policy of the law is that there should be finality in litigation; no one should be vexed twice for the same cause of action.
>
> ...
>
> From the above it is therefore clear, that the burden is on the defendant to satisfy this court with precision, what were the issues determined by the previous courts which the defendant alleges are being brought again before me for determination. In the defendant's entire submission, learned counsel was harping on the point of 'termination' which according to counsel is the cause of action which had been determined. Counsel then referred to the decision on 3 May 1990, as confirming the court's determination of 'termination' and also to the notes of proceeding of the first action (see exh 'PR3' — encl (6)).
>
> However on reading the grounds of judgment of Abdul Razak J for the decision of 3 January 1991 it is clear that the only determination made by the court was that the summary procedure was inapplicable in the circumstances of this case and that the plaintiffs must commence a writ action to have the issues tried. To my mind this is what the plaintiffs are doing in the present action — to have their claims litigated before me.

In respect of the second action, it was brought by the defendant for a declaration that the agreement is null, void and unenforceable and also for rescission of the agreement. The defendant's allegations and averments had been dismissed by NH Chan J (as he then was) and was reaffirmed by the Supreme Court. Thus the plaintiffs are now enforcing their rights under the agreement against the defendant and as such the plaintiffs' cause of action and remedy sought against the defendant is clearly different from the cause of action and remedy sought by the defendant against the plaintiffs in the second action.

In *Thoday v Thoday* [1964] 1 All ER 341, it was stated (at p 347) that:

> ... where the cause of action or plea in defence in the second suit is different from that put forward in the earlier suit, then it can be said that the res which was the subject of the previous adjudication is not the same res, and in such circumstances a party will not normally be held to be estopped from raising the plea.

Lastly the defendant's authority of *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd* is distinguishable on the facts to the present case. In that case the court was invited to decide on similar issues, ie, the loss and damage suffered by the appellant on the failure or refusal of the finance company to allow the borrower to utilise the loan. In our present case, the judge in the first action having decided that O 89 applies granted order in terms for vacant possession which he himself subsequently reversed after further argument and held that O 89 is inappropriate.

Likewise the plea of multiplicity of actions cannot stand in this case as it is trite law that such a defence has to be pleaded. In any event, it is my considered opinion that there is in essence only one action before this court as the defendant has failed to show that there are other actions which are similar in nature and relief sought, pending in other courts.

Whether the bank can succeed based on a witness who allegedly has no personal knowledge of the matter?

[79] In the trial, the bank only called one officer, PW1, as a witness. PW1 is part of the bank's Federal Territory Regional Corporate Remedial Management team.

[80] On this issue, the solicitors argue that a case of this magnitude requires a robust presentation of evidence, and the bank's failure to call additional witnesses undermines its case. This is because PWTs testimony was not sufficient, and more so when the bank failed to call any expert witness to substantiate the standard of care owed by the solicitors in the 314 action. Furthermore, the bank did not call any other material or key witnesses from its side who were involved in the previous actions or dealt with the legal firm. Comparatively, the solicitors called five partners who offered a cohesive and well-rounded perspective.

[81] I will now address this specific issue. A

[82] As for PWTs alleged lack of personal knowledge about this case and her admission that the information she provided was based on documents, I find this case to be one in which the dispute is heavily based on documentation whose existence is not contested by either party in a significant way. B

[83] In this sense, I am not required to interpret the meaning or construction of the documents or agreements involved in this dispute. For me, the most important question is whether certain conduct or omissions have resulted in a breach of professional negligence and/or a breach of contract by the solicitors and the legal firm. Furthermore, the parties are mainly relying on common events that occurred throughout the material time period. In light of this, my decision will also be based on my understanding of the dos and don'ts of specific actions and/or omissions of both parties, as well as whether certain terms of engagement were broken or some standards have not been met, as supported by the relevant documents and material events. Additionally, the extensive agreed-upon facts described above support this conclusion. C D

[84] Therefore, PWTs position as a witness is acceptable in this case, subject to the proving of evidence on a balance of probabilities basis. To this end, the undisputed documents speak for themselves regarding the surrounding circumstances rather than the witnesses' accurate understanding or recollection of the events. E F

[85] Thus, even if the solicitors challenge the failure to call material witnesses, I find that the issues formulated in the amended statement of claim and advanced during the trial are acceptable to this court subject to their weight. They are backed up by contemporaneous documents in this regard. Ultimately, this is a dispute involving a business and professional relationship based heavily on facts and events that occurred in the course of ordinary business. G

[86] Regarding the solicitors' argument that the bank must call an expert witness to prove its case, I find that the bank produced sufficient authorities to demonstrate some duties owed by solicitors to their clients that the court may consider. In order to provide context, I reproduce herein some of those authorities as submitted by the bank in its post-trial written submissions: H

(a) a solicitor's failure to register an option to purchase the freehold reversion of a farm (as an estate contract under the (UK) Land Changes Act 1925) constitutes a breach of professional duties to exercise reasonable care and skill (see *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571); I

(b) a solicitor's failure to prepare or execute a formal declaration of trust or other suitable instrument or to cause appropriate entries to be made on the register constituted a breach of contract and negligence (see *Bell v Peter Browne & Co* [1990] 2 QB 495);

(c) a solicitor's failure to advise and/or adequately guard against a foreseeable risk to protect the client's interests amounted to a breach of duty of care (see *Elinoil-Hellenic Petroleum Co SA v Wee Ramayah & Partners* [1999] SCD 136; [1999] 1 SLR(R) 977);

(d) a solicitor's failure to protect his client's interest by securing a redemption agreement for his client which directly resulted in loss to his client amounted to negligent conduct (see *Loh Bee Juan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd & Ors* [2002] 2 MLJ 532; and *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359);

(e) a solicitor's failure to advise or warn the client of anything that is unusual and anything that affect the client's obtaining of the benefit of the contract which he sought to obtain amounted to a breach of duty of care (see *Mulpha Kluang Maritime Carriers Sdn Bhd v Philip Koh Tong Ngee & Ors* [2016] 10 MLJ 517; [2015] 8 CLJ 555);

(f) a solicitor's failure to take the necessary steps and precautions to protect and secure his client's interests before releasing a sum held by the solicitor as a stakeholder and to render proper advice and ascertain and/or ensure that his client's interests in the property purchased was secured at all material times amounted to a breach of his duties (see *Mohd Raffi bin Abdullah v Kumaresan a/l K Naggiah & Anor* [2019] MLJU 2071; [2019] 1 LNS 1673);

(g) a solicitor's failure to use reasonable care and skill in giving his advice and taking such action as the facts of the case demand of a normally competent and careful practitioner in a sale and purchase of land, such as making a search at or an enquiry with the land office relating to the acquisition of the land under the Land Acquisition Act 1960, renders the solicitor liable (see *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126; [1983] 2 CLJ 218);

(h) a solicitor's failure to verify the beneficial ownership of the subject property resulting in the client bank losing its security interest in the subject property following its disbursement of the loan, constituted a breach of duty of care (see *OCBC Bank (Malaysia) Berhad v Kok Weng Tuck & Ors* [2015] MLJU 2040; [2015] 1 LNS 1336);

(i) a solicitor's failure to seek verification of a letter of authorisation (in a conveyancing brief which practice requires a high degree of skill and caution on the part of the solicitor for the purposes of protecting his clients' interest against possible fraud or forgery), which led to the release

by the said solicitor of land titles to a third party who had no right to receive them, constituted an act which falls well below the standards expected of a prudent conveyancing solicitor (see *Lai Foh & Sons Sdn Bhd v Skrine & Co (didakwa sebagai sebuah firma)* [2001] MLJU 250; [2001] 3 CLJ 185);

(j) a solicitor's failure to protect the client's interest by failing to, inter alia, draw to the client's attention the fact that the client had not acquired a beneficial interest to each of the properties it had acquired constituted a breach (see *Ong Guek Siang & Anor v Asset First Sdn Bhd & Anor* [2012] 10 MLJ 61); and

(k) a solicitor's failure to take precautions when he knew that the property was subject to an existing mortgage yet the solicitor forwarded the purchase price to the vendor's solicitor (and not the mortgagee or its duly authorised agent) amounted to a failure to exercise the standard of care owed (see *Edward Wong Finance Co Ltd v Johnson Stokes & Master (A Firm)* [1984] AC 296).

[87] Furthermore, the main substantial issue faced by this court is whether there was a breach of the general professional duties on the part of the solicitors to exercise diligence as well as due care and skill when acting to protect the bank's interests, and whether those elements can be proven as owed by the solicitors to the bank, as will be discussed further in the next segment. It is evident from the disclosure of the facts that the underlying main substantial issue is not complex enough to require expert testimony, as contrasted to some other niche or specialised areas, such as foreign law, other elements of the medical sciences or other professional scopes outside the scope of the law.

[88] In a specific instance which is also relevant to the issue at hand, in *Megat Najmuddin bin Megat Khas & Ors v Perwira Habib Bank Malaysia Berhad* [2003] 4 MLJ 65, it was held that the fact that the bank did not request specific advice from the solicitors in writing did not absolve the solicitors of liability for negligence. His Lordship Mohd Noor Ahmad JCA observed as follows at pp 74, 75 and 76:

(2)(a) Under topic A, the learned counsel submitted that the respondent never asked for specific advice in writing from the appellants. The appellants merely responded to the borrower's urgent request for the use of the first OD and the proposal to create a LHC over the land as reflected in the borrower's letter to the respondent dated 29 August 1984 (*rekod rayuan Jld* II at p 352), by giving the advice in their first letter, acting on the information gathered from the respondent's letter dated 23 August 1984. Though the letter of offer stated that the utilisation of the overdraft facility might be allowed only after the execution of all security documents and presentation of the charge for registration, the respondent had already disbursed RM200,000 to the borrower even before the appellants' advice had been sought. The contention of the respondent that the disbursement of RM200,000

was in respect of a temporary overdraft on a clean basis and only to be a part of the first OD if the charge was perfected, was inconsistent with the respondent's pleaded case and an afterthought. And in respect of the failure on the part of the respondent to produce the documentary evidence to prove that the borrower had applied for a temporary overdraft on a clean basis the court ought to have invoked the presumption under s 114(g) of the Evidence Act 1950 ('the Act') by drawing an adverse inference against the respondent, in the result that the evidence withheld must be held unfavourable to the respondent, that is to say, there was no such request from the borrower. Therefore, the absence of any request for advice from the appellants prior to that disbursement to the borrower shows an absence of causation between the alleged negligent act and the detriment.

(b) The learned judge found and concluded that the instructing letter from the respondent to the appellants dated 23 August 1984 was very clear, that is to say, the respondent wanted a third party first legal charge on the land; however, on the borrower's request for a LHC the appellants volunteered the advice that a LHC was sufficient security. The learned judge was correct in his findings and conclusion. In our view, the fact that the respondent never asked for specific advice in writing from the appellants does not absolve the appellants from liability for the negligent advice. In respect of the earlier release of RM200,000, the trial judge believed the respondent's witnesses who testified that the disbursement was to be treated as a separate facility on a clean basis and only to be part of the first OD, if the charge was perfected, and from his finding of facts he concluded that the appellants were not liable for that sum. We decline to interfere with his findings based on facts and credibility. Having regard to the evidence adduced and believed by the learned judge we are satisfied that the learned judge was right in not invoking the adverse inference against the respondents under s 114(g) of the Act for the non-production of the said documentary evidence because, on the facts there is insufficient ground to warrant such presumption. Presumptions of fact must not be drawn automatically, or, as it were, by rule of thumb without first considering whether in the circumstances of each particular case there are adequate grounds to justify any presumption being raised (per Ong J in *Mohamed Ali v Public Prosecutor* [1962] 1 MLJ 230). Even if the presumption is to be applied, the appellants are still liable for the amount released to the borrower after the negligent advice was given. Although the learned judge did not place any emphasis on the real question of legal causation, on the facts, we are satisfied that the advice of the appellants that the LHC was sufficient security was a cause of the respondent disbursing the first OD and subsequently the second OD to the borrower to its detriment. Therefore, we do not agree that there was an absence of causation between the alleged negligent act and the detriment. However, there was an absence of causation in respect of the RM200,000 because the appellants' advice was not the cause of its release. Hence, the learned judge was justified and right to have concluded that although the appellants were not liable for the separate facility of RM200,000 granted on a clean basis before the matter was referred to the appellants, they were liable in negligence to the respondent for the loss suffered in respect of the entire sum on the first OD.

[89] Furthermore, there were no allegations that the bank suppressed or withheld evidence. As such, there is no basis for drawing an adverse inference based on section 114(g) of the Evidence Act 1950 (see *Letchumanan Chettiar*

Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, where it was held by the Federal Court per His Lordship Jeffrey Tan FCJ that it was trite law that an adverse inference could only be drawn if evidence was withheld or suppressed and not merely because evidence was not obtained, thus since there was no evidence of evidence withholding or suppression, the adverse presumption under s 114(g) of the Evidence Act 1950 was not appropriate).

Can the bank maintain an action under breach of contract and professional negligence together?

[90] As part of their defence of the bank's claim, the solicitors strongly argue another important point.

[91] A question arises regarding whether the bank can bring an action for breach of contract as well as professional negligence in the same suit?

[92] As a starting point for the solicitor's argument, they rely on the Privy Council decision in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others* [1985] 2 All ER 947 where Their Lordships did not believe that there was anything to the advantage of the law's development in searching for liability in torts where the parties were in a contractual relationship particularly so in a commercial relationship.

[93] Hence, the solicitors take the view that under the earlier English law, a party can bring separate and concurrent claims based on breach of contract and professional negligence arising from the same set of facts. However, as a result of *Tai Hing Cotton Mill Ltd,* this position has been changed.

[94] The solicitors argue that, following the principle laid down by the Privy Council in *Tai Hing Cotton Mill Ltd,* this principle apply to a situation in which when there is an alternative liability in tort, the claimant must pursue his remedy in contract alone. The reason is that a concurrent or alternative liability in tort can never be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

[95] In support of this argument, the solicitors contend that the Privy Council decision is binding on the Malaysian courts. As a result, the doctrine of stare decisis would dictate that such principle must apply to the bank's claim against the solicitors (see s 5 of the Civil Law Act 1956 and *Arumugam Pillai v Government of Malaysia* [1980] 2 MLJ 283; [1980] 1 LNS 3).

[96] It is further stated by the solicitors that the *Tai Hing Cotton Mill Ltd* principle that a purported duty under tort cannot arise when there is an agreement is correctly applied in two Court of Appeal decisions in *Credit Guarantee Corporation Malaysia Berhad v SSN Medical Products Sdn Bhd* [2016] MLJU 1304; [2017] 6 CLJ 129 and *CIMB Islamic Bank Bhd v Khairuddin bin Abu Hassan* [2021] 2 MLJ 155; [2021] 4 CLJ 375 (CA). Since the bank also pleaded breach of contract, the solicitors cannot now be sued under negligence, since where there is an alternative liability in tort, the bank must pursue its remedy in contract alone.

[97] Having those authorities guiding the solicitors on the local position, the solicitors are of the view that other cases that did not follow the principle laid down in *Tai Hing Cotton Mill Ltd* erred for not adhering to the doctrine of stare decisis. In order to be complete, I will refer to those authorities that the solicitors imply should not be followed.

[98] In *Lim Soh Wah & Anor v Wong Sin Chong & Anor and another appeal* [2001] 2 CLJ 344, His Lordship Gopal Sri Ram JCA (as His Lordship then was) recognised that advocates and solicitors must exercise reasonable care and skill and that such duties exist both under contract and under the law of tort. While His Lordship did not mention the *Tai Hing Cotton Mill Ltd* case, His Lordship quoted the following words of Lord Goff in *Henderson & Ors v Merrett Syndicates Ltd & Ors* [1994] 3 All ER 506 at pp 349–350:

> Advocates and solicitors undertake an onerous task when they agree to act for a client. There is an assumption of responsibility by the advocate and solicitor coupled with reliance by the client on the skill of the advocate and solicitor. The advocate and solicitor's duty to exercise reasonable care and skill is imposed both by contract and by the law of tort. Here, we need do no more than quote the words of Lord Goff in *Henderson & Ors v Merrett Syndicates Ltd & Ors* [1994] 3 All ER 506, 530:
>
> > The judgment of Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571; [1979] Ch 384 provided the first analysis in depth of the question of concurrent liability in tort and contract. Following upon *Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 5; [1976] QB 801, it also broke the mould, in the sense that it undermined the view which was becoming settled that, where there is an alternative liability in tort, the claimant must pursue his remedy in contract alone. The development of the case law in other common law countries is very striking. In the same year as the *Midland Bank Trust* case, the Irish Supreme Court held that solicitors owed to their clients concurrent duties in contract and tort: see *Finlay v Murtagh* [1979] IR 249. Next, in *Central Trust Co v Rafuse* [1986] 31 DLR (4th) 481 Le Dain J, delivering the judgment of the Supreme Court of Canada, conducted a comprehensive and most impressive survey of the relevant English and Canadian authorities on the liability of solicitors to their clients for negligence, in contract and in tort, in the course of which he paid a generous tribute to the analysis of Oliver J in the *Midland Bank*

Trust case. His conclusions are set out in a series of propositions (at 521–522); but his general conclusion was to the same effect as that reached by Oliver J. He said (at 522):

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence.

I respectfully agree.

[99] The Court of Appeal also did not follow *Tai Hing Cotton Mill Ltd* in *Bank Utama (M) Bhd v Insan Budi Sdn Bhd* [2009] 1 MLJ 148; [2009] 1 CLJ 221, where His Lordship Hasan Lah JCA (as His Lordship then was) agreed with the decision of Gopal Sri Ram JCA (as His Lordship then was) in *Lim Soh Wah*.

[100] After considering the solicitors' arguments and the bank's position, I am of the opinion that the principle of stare decisis does not bind me in this regard. The reason is that in making my findings on this issue, I follow the Federal Court's decision in *Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor* [2024] 3 MLJ 544. On the basis of this decision, it appears to me that tort and contract actions are not mutually exclusive and can co-exist. Her Ladyship Mary Lim FCJ made the following observations when delivering the judgment of the Federal Court at pp 558 and 560–562:

> [41] In the appeal before us, the appellants' statement of claim starts with the contractual relationship between the parties. However, the claim is not founded on that contractual relationship; it is grounded in tort. It claims the existence of a duty of care owed by the respondents to them, that there is a breach of that duty of care in the manner and for the reasons already set out in the earlier part of this judgment; and that by reason of the breach, the appellants have suffered damage in the value of their property and other damage. As pointed out earlier, all these elements were successfully established by the appellants and the findings of fact by the High Court remained undisturbed by the Court of Appeal. There was no appeal by the respondent. The only issue was that of limitation.
>
> ...
>
> [50] This is where one must be alert to the fact that there may be more than one breach giving rise to two different causes of action, though both may be founded in tort; or one in tort, the other in contract. The liability of solicitors may be founded in both contract and tort; that is settled law — see *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571; *Ross v Caunters* [1980] Ch 297; *Forster v Outred & Co* [1982] 1 WLR 86; *Costa v Georghiou* (1983) 1 PN 201; *DW Moore & Co Ltd and others v Ferrier and others* [1988] 1 WLR 267; *Bell*

v Peter Browne & Co (a firm) [1990] 3 All ER 124; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39; [1984] 1 CLJ Rep 251; [1984] 1 MLRA 165; and *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126; [1983] CLJ Rep 663; [1983] 1 MLRH 175.

[51] It bears reminding that in this appeal, the claim was not one founded in contract, where frequently the courts have referred to *Nasri v Mesah* as authority for the proposition that the cause of action in contract accrues from the breach. Gill FCJ had opined there that 'the period of limitation ... can be said to have begun to run from the first clear and unequivocal threat to the plaintiffs right to a transfer of the land'. The pleadings were then examined to determine what the pleas and responses were before the Federal Court concluded that there was no evidence of any such threat in which case the claim was not time-barred. See also *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209; [2005] 4 CLJ 717.

[52] In actions founded in tort, damage is an essential element, without which there is no complete and actionable claim. Time runs from when damage occurs and not when the negligent act or omission occurred — see *Bell v Peter Browne & Co (a firm)* per Nicholls LJ who said:

> One might have expected that parallel professional negligence claims based on contract and the tort of negligence would have a common starting date for the running of the six-year limitation periods applicable in most cases under the 1980 Act. *But this is not so, because a cause of action based on negligence does not accrue until damage is suffered.* It is from that date, not the date on which negligent act or omission occurred, that the six-year limitation period prescribed by section 2 of the Limitation Act 1980 runs. (Emphasis added.)

[54] On the facts, asking that same question of the appellants would yield, at best, a right to some nominal damage; if the action was founded in contract in relation to the preparation of the relevant agreements. But, this was a claim in tort for negligent misstatement and negligence. The period of limitation runs from the date of the damage and not from the act which caused the damage — see *Backhouse v Bonomi* (1861) 9 HL Cas 503.

[101] An earlier Federal Court decision in *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39 observed that a solicitor would be liable in both tort and contract. As stated by His Lordship Syed Agil Barakbah FCJ at p 45:

> Liability in tort
>
> The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skillful and careful and for failure to fulfil this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort. (See *Halsbury's Laws of England*, 3rd Ed Vol 36 p 96, para 131). He owes a duty not to injure his client by failing to do that which he had

undertaken to do and which his client has relied on him to do (*Midland Bank Trust Co Ltd*). Applying this principle, we are satisfied form the evidence on record, that the learned judge was justified in concluding that the appellants had not only failed to perform their obligations under the contract with the required skill and care but were also liable in tort for their wrongful act of depriving the respondents from having security for the loan they have advanced by failing to execute a memorandum of charge.

[102] Having been guided by the above cases of *Julian Chong Sook Keok, Yong & Co* and *Lim Soh Wah,* I am further relying on the wisdom of His Lordship Lee Swee Seng JC (as His Lordship then was) when faced with similar concerns in *Saamah Saruan v Norhisham Tahir & Ors* [2011] MLJU 1571; [2010] 1 LNS 1595, In this case, not only did His Lordship Lee Swee Seng JC not follow *Tai Hing Cotton Mill Ltd,* but His Lordship further succinctly analysed the Privy Council's position as follows to suit the issue at hand:

I do not think that the Privy Council is saying in *Tai Hing Cotton Mill Ltd* that in every case where there is a tortious duty vis a vis a contractual duty, then the tortious duty is subsumed within and indeed constricted and contained within the contractual rights and liabilities of the parties. The Privy Council had in mind a situation where a party's tortious obligation is co-extensive with the party's contractual obligation. Neither is the Privy Council excluding the fact that there may well be cases where the tortious duties are not overridden, over-shadowed and indeed obliterated by the contractual obligations or otherwise of the parties. Where contractual liabilities have not fully addressed the issue of negligence of a party to the contract, it cannot be said that that party's obligation in tort cannot arise at all. If it were not so then it would have been a simple task for a party to exclude or limit liability by a properly worded exclusion clause and that would conclusively snuff out and shut out any argument on liability in tort where the facts are plainly obvious. Courts have devised concepts of inequality of bargaining powers, fundamental breach and public policy in the interest of justice. More so where a corporation's tortious duty is obviously breached and its consequences overwhelming, this Court would not allow the negligent party to take shelter and shield itself under the contractual clause containing and constricting liability and worse still cancelling liability all together!

[103] Accordingly, I find that all the preliminary issues raised by the solicitors are without merit.

[104] I will now examine the bank's claims and the solicitors' defences based on their respective merits.

Substantial issues

Whether the loss was caused by the bank's own breach coupled with the fact that the parties were complying with a valid court order?

[105] What caused the loss? Was it the bank's own breach combined with the fact that the parties were only following a valid court order?

[106] Under this issue, the solicitors forcefully assert that the bank has no basis to even initiate this claim in the first place given that the bank has to be taken as exhausting all of its legal rights in the earlier actions and appeals prior to the filing of this suit. The facts narrated above in paras 9–52 illustrate this. This included the 22 June 2011 High Court interim order by consent allowing Sparrows to sell the Megan property to Kopetro in the 314 action.

[107] Further to this, the solicitors argue that not only was the legal firm not consulted or involved in the negotiations between the bank, Sparrows and its guarantors regarding the settlement sum of RM1.8m, but it was also unaware of and not involved in the SPA between Sparrows and Kopetro.

[108] As part of their further argument, the solicitors argue that the bank neglected to take certain actions which resulted in the bank's own losses. As the solicitors emphasised, the bank had failed to comply with the loan agreement cum assignment dated 23 April 1997 ('LACA') by not collecting the title from the developer when it was issued in 2003. the bank also failed to ensure that its previous solicitors, Messrs Kassim Tadin, Wai & Co, charged the security to the bank under the power of attorney conferred upon it by Sparrows.

[109] To compound the matter further, the solicitors claim that the bank had appointed Messrs Jal and Lim in 2010 to claim the judgment sum obtained against Sparrows in the case of *Gale Force Sdn Bhd v Ling Yun Yoke (Malayan Banking Bhd, intervener)* [2012] MLJU 1 before appointing the legal firm to defend Suit 314 in April 2011. In this instance, although the bank received the auction proceeds from Ling Yun Yoke's Damansara property that was auctioned off, the bank voluntarily released the balance sale proceeds to Gale Force without exercising its lien or right to set off as well as failing to immediately stop the balance sale proceeds from being paid. Further, the bank accepted Ling Yun Yoke's proposal to pay RM1.8m from the sale proceeds of her Damansara property as settlement for Sparrows' judgment.

[110] This issue has been carefully considered by me.

[111] It is clear that the solicitors' issues raised above stem from their forceful arguments that since they were only retained by the bank limited to litigation

proceedings and their legal firm was on the bank's panel, the solicitors or its legal firm did not have a duty of care towards the bank in matters related to conveyancing.

[112] In relation to this, the bank argues that it has a well-founded claim against the solicitors for breach of contract and negligence for breach of their professional duties. According to the bank, the solicitors owe them a tortious duty of care, along with an additional contractual duty implied or expressly imposed on them. As a result, the bank has alleged that the legal firm and the solicitors breached their duties, causing damage and loss to the bank. As a result of the actions and/or omissions of the legal firm, this risk was foreseeable and not too remote, according to the bank.

[113] As I approach this issue, I have at the forefront of my mind that the law is trite in that when determining whether there is a breach of duty by solicitors, the applicable standard of care is what a reasonably competent solicitor would act when faced with such factual circumstances.

[114] To this end, it is undeniable that the bank retained the legal firm to act on its behalf and that there was indeed a solicitor-client relationship between the parties throughout. Consequently, the legal firm continued to handle related matters for the bank for over ten years.

[115] In this regard and based on the facts of the case, it appears to me that despite the bank having initially instructed Messrs Kassim Tadin, Wai & Co to register a land charge over the property when the strata title was issued, the bank's instructions to register the land charge were superseded by the bank's instructions to the legal firm to file a civil action against Sparrows and its guarantors, and to proceed with the sale of the property. These instructions have continuously been in place since 16 February 2006, when the legal firm was appointed as the bank's solicitors.

[116] After analysing all the evidence before me, I conclude that the legal firm was aware at all material times that the strata title to the property was issued and held by the developer and that the developer had agreed to transfer the strata title when the bank auctioned it. In this way, the legal firm could sell the property without registering a charge.

[117] In light of all this background to this claim, I conclude that the sale of the property to Kopetro and the transfer effected thereon resulted in a breach of not only the tort of negligence that governs the relationship between the parties herein but also the contractual relationship when the legal firm and the relevant solicitors failed to act in accordance with the retainer contracts, either explicitly or implicitly.

[118] This is evidenced by the fact that the bank has always instructed the legal firm to realise its assigned security through a public auction. As a result, there is an obligation on the legal firm to take all reasonable steps that a reasonably prudent solicitor would take upon being instructed to act as such. For the bank to maintain its interest in the security, the legal firm should have taken appropriate actions to keep the property from being transferred away, as well as to ensure that the proceeds of such a sale could be paid over to the bank to satisfy the judgment sum due by Sparrows and that the bank's rights to recover such sums would never be affected by any action taken by any party.

[119] In addition, despite any other intervening events in between the relevant period, the bank's retainer for the recovery of Sparrows' loan and the realisation of the property remained unchanged at all material times.

[120] Based on these facts, I also agree with the bank's position that the legal firm, knowing that the strata title had been issued for the property and that the bank had not registered its charge, should have reasonably foreseen the risks associated with the issue document of title ('IDT') being in the hands of and registered in the name of the developer. This could, in turn, lead to the bank losing control of the Megan property, as happened in this case.

[121] Moreover, I believe the bank is entitled to assume that the legal firm had taken all reasonable measures to protect the bank's interests in relation to the Megan property, which interests were at the time limited to personal rights under the LACA and were unsecured because the charge was not registered.

[122] To demonstrate that obvious risks must always be brought to clients' attention by solicitors, I am quoting *Elinoil-Hellenic Petroleum Co SA v Wee Ramayah & Partners* [1999] SCD 136; [1999] 1 SLR(R) 977, which the Singapore High Court decided. In this regard, solicitors are required to exercise their professional skill and judgment on behalf of their clients. Not only should solicitors consider the instructions they receive, but also the legal implications that may affect their clients. In relation to such an issue, His Lordship Chao Hick Tin J observed at pp 990–992 and:

> Was there a breach of the duty of care?
>
> 45 I now turn to consider briefly the law on the duty of care of a solicitor and whether in the circumstances of this case WRP have breached that duty. I have borne in mind what Tindal CJ said in *Godefroy v Dalton* (1830) 6 Bing 460; 130 ER 1357 that it would be extremely difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case, between what would satisfy that undertaking and what would not. But the general principle is clear enough: a solicitor is bound to exercise reasonable care and diligence in protecting the interest of his clients.

...

The standard of care is that of the reasonably competent solicitor

47 According to *Jackson & Powell on Professional Negligence* at p 334, the obligations of a lawyer are the following:

(1) To be skilful and careful;

(2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary;

(3) To protect the interest of his client;

(4) To carry out his instructions by all proper means;

(5) To consult with his clients on all questions of doubt which do not fall within the express or implied discretion left to him;

(6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

48 A reasonably competent solicitor handling an admiralty claim should be familiar with the provisions in the High Court (Admiralty Jurisdiction) Act and the passage in the Supreme Court Practice 1999 (which apparently first appeared in the 1985 edition) and know that merely lodging a caveat without also filing a writ in rem would not secure a clients claim. Under O 70 r 13 of the Rules of Court, the caveat would only entitle the caveator to notice if the vessel under arrest is to be released or the proceeds of sale of the vessel are to be paid out. *Elinoil's instructions to WRP were to secure their claim. The duty of WRP was to inform and advise. Obvious risks must be brought to the attention of the client and advice tendered in relation thereto. In our case here, it seems to me clear that the question of a possible sale by the owners while the vessel is under arrest, and the question of its impact on the clients' claim if no writ in rem is issued, were overlooked by WRP. While a solicitor should not be held liable for a true error of judgment, there was no error of that nature here as WRP never addressed their mind to those two questions. WRP thought no sale was possible when a vessel was under arrest.*

49 *While I recognise that a solicitor is not under a duty to consider every aspect of his client's affairs, he is nevertheless obliged to exercise his professional skill and judgment in the interest of his client and the extent of this obligation is determined by his retainer. A solicitor does not discharge his duty by following instructions blindly. He must consider not only his instructions but also the legal implications of the facts presented to him by his client, and advise the client accordingly: McMullen Homes Ltd v Farell* (1993) 1 IR 123, 51 *All reasonable options, with their ramifications, should have been placed by WRP before Elinoil who should then be asked to decide. In this instance all that WRP advised Elinoil to do was the lodgment of a caveat, without highlighting its limitations or pitfalls.* It is true that SLO did not respond to WRP with the registration number and registered office of Elinoil until 11 April 1997. But WRP never explained the need for those particulars; neither did they send any timely reminder: see *Fletcher & Son v Jubb, Booth & Hellivvell* [1920] 1 KB 275.

...

55 *If the correct position in law is that as contended for on WRP's behalf namely, that a*

> *vessel under arrest with an order for sale could not be sold by private treaty and that such a sale is invalid and passes no title whatsoever, then why didn't WRP object to the release of the vessel on 11 April 1997 and take such other steps as might be necessary to protect Elinoil's interest? The fact that the learned judge merely noted the point made by another solicitor, that the sale amounted to contempt, should not preclude WRP from objecting to the release and taking it up on appeal, if overruled.* Why didn't WRP advise Elinoil to have the vessel arrested following the filing of Admiralty in Rem 240/1997? Elinoil were not advised on all these matters. As I see it, WRP knew on 11 April 1997 that they had failed in their duty. Whatever subsequent steps they took were futile, being too late. (Emphasis added.)

[123] Further, I also find that a bank that has been given an absolute assignment by a borrower of the secured property by way of LACA is entitled to realise its security by way of a private sale. For this reason, the bank does not need to create a charge before realising its security. Similarly, the bank is also entitled to hold a public auction in accordance with the LACA despite the charge not being registered.

[124] On this issue, the Federal Court in *Damai Freight (M) Sdn Bhd v Affin Bank Bhd* [2015] 4 MLJ 149, in the judgment of His Lordship Abdull Hamid Embong FCJ, found as follows at p 165:

> [33] In addition, we are unable to agree with the view of the appellant that since the document of title to the land has been issued, the bank has to create the proposed charge first before it could proceed with the foreclosure proceedings. This seems to suggest that in a situation where the issue document of title to a land has been issued, an absolute assignment must first be extinguished before the assignee could foreclose the land. We do not think this is the correct proposition of the law. There is nothing in law which says that once document of title is issued, the absolute assignment is extinguished. On this point, we agree and cite with approval these passages from the judgment of the High Court in *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154 which held as follows:
>
> > There is no statute or rule in common law that once an individual title or strata title is issued, the absolute assignment is extinguished. Likewise, there is nothing to say that the assignee must extinguish the assignment by ensuring the assignor takes a transfer of the property and creates a charge in favour of the lender In the absence of any statutory provision or rule of common law, the court must give effect to the intention of the parties that is reflected in the contractual provisions of the assignment. This is plain from the judgment of Abdul Malek Ahmad FCJ in *Phileoallied* where His Lordship said that in such cases 'the court should give effect to and recognise the contractual rights'. Unless the contractual provisions in the assignment provide that it is extinguished upon the issuance of an individual or strata title, the assignment is not extinguished. Unless the assignment imposes an obligation on the assignee to ensure that title is transferred to the assignor and a charge is registered, thecourt cannot impose such an obligation on the assignee in the absence of statutory power or common law enabling the court to do so ...

...

[45] In conclusion, we make the following summary of our findings:

(a) the LACA, has created an absolute assignment not one by way of charge only. This means that the bank should have all the rights, title and interest of the assignor/appellant under the principal agreement;

(b) when title was issued to the land, the bank did not lose its security or its power of sale under the LACA. The absolute assignment under the LACA survives;

(c) the bank is thus empowered to realise its security for the loans by way of a private sale of the land;

(d) the purchaser merely takes a legal right of the chose in action that was assigned to the bank. The sale of a chose in action is permissible under s 4(3) of the Civil Law Act 1956;

(e) there is no necessity to first create a charge or for the bank to resort to the statutory remedy of a foreclosure action under s 256 of the NLC, to realise its security. The bank's recovery action stands independently; and

(f) s 206 (3) of the NLC allows such a transaction relating to any alienated land to give effect to the contractual obligations and rights of the parties as they had determined under the LACA.

[125] Now that I have addressed the above point, let me turn to the following relevant and related issues.

Whether the legal firm's duty of care towards the bank was limited to litigation matters since the legal firm was only on the bank's litigation panel?

[126] On this point, I am also of the opinion that when the findings herein clearly show that not only did there exist elements of negligence towards the bank but also a breach of contract on the part of the legal firm, all partners are held accountable, regardless of whether the negligence and/or breach of contract took place in Petaling Jaya as opposed to Kota Bharu and irrespective of whether there was a division of works between the two branches. In order to clarify, the bank's matter was handled by the Petaling Jaya Branch instead of the Kota Bharu Branch.

[127] As a result, in as much as it appears to impose strict liability on the part of solicitors to know everything reasonably possible about the knowledge of the law they are expected to possess, as long as the facts of the original assignment remain the same, it does not matter whether the legal firm was initially retained for litigation proceedings only and later became engaged in conveyancing

issues that arose when dealing with the original assignment. As far as protecting their clients' interests is concerned, solicitors' duty to act on behalf of their clients transcends their practice areas.

[128] Obviously, solicitors are responsible for protecting their clients' interests at all times. In this instant, when the legal firm was appointed by the bank for both the recovery of loan in personam and, more importantly, for the realisation of Megan Property in rem, the legal firm automatically assumed its duty in its professional capacity to protect the bank's interests not only in recovering the loan taken by Sparrows and its guarantors but also in ensuring that the Megan property was protected so that the bank could recover the loan from such security.

[129] In this regard, even if, assuming for a moment, a legal firm or its solicitors are not capable of handling a particular issue that arises during the course of the initially engaged matter, there is still a duty on their part to advise the client about the existence of facts that may affect their client's interests. It would be obligatory for solicitors to make their clients aware of this fact, even if it means the client appoints another firm to handle the matter.

[130] The most important aspect is that solicitors or a legal firm are responsible for identifying reasonable issues to protect their client's interest during the course of the assignment. It should be the standard test determining the extent of such duties on the part of solicitors and law firms.

[131] In *Mulpha Kluang Maritime Carriers Sdn Bhd v Philip Koh Tong Ngee & Ors* [2016] 10 MLJ 517; [2015] 8 CLJ 555, the High Court was of the view that a solicitor under a retainer is required to take pro-active steps to ensure he advises the client not only about matters where advice is specifically required, but also about matters that he may reasonably anticipate as a risk to the client if acting with reasonable skill and diligence. As Her Ladyship Rozana Ali Yusoff JC (as Her Ladyship then was) stated at pp 528–529 (MLJ); pp 565–566 (CLJ):

> [26] Having considered the evidences and the submission of parties, the court arrived to the findings as follows:
>
> (a) in our legal system, the solicitor and client relationship has long been recognised as a fiduciary relationship. The term 'fiduciary' means trust, so in a fiduciary relationship the client places his or her confidence, good faith, reliance and trust in the solicitor, whose advice is sought in some matter. A fiduciary relationship creates many legal duties for the solicitor in whom the trust has been placed. *Generally the solicitor must act in the best interests of the client including to act honestly and fairly in a clients best interests; to act with due skill and diligence, reasonable promptness; and courtesy and communicate effectively and promptly with clients. In the context*

of a property transaction the case of Macindoe v Parbery (1994) Aust Torts Reports 81–290 held that it will include a duty to warn the client of anything that is unusual or anything which may affect the client obtaining the full benefit of a contract entered into. In *Hawkins v Clayton* (1988) 164 CLR 539 at 578–579; (1988) 78 ALR 69 held that it is a trite law that a lawyer owes their client a duty of care requiring the lawyer to take reasonable steps to avoid their client suffering foreseeable economic loss;

(b) the extent of a solicitor's duty to their client is determined by both the retainer with the client and the solicitor's general law duty of care. A general retainer for example, to act for a conveyance for a client, will encompass both specific duties under the retainer and the concurrent duties in tort. To *fulfil these duties a solicitor under such a retainer will be required to take pro active steps to ensure to advise the client not only of the matters where advice is specifically requested, but also in relation to matters which the solicitor acting with reasonable skill and diligence would foresee as a risk to the client.* The ultimate test is that; firstly, that the defendant owes a duty of care; secondly, that he breached it; thirdly, that the plaintiff have suffered a loss; and finally, that the defendant's conduct caused that damage ('causation'). In *Tan Sri Datuk Ibrahim Mohamed v Leong Tuck Onn & Anor* [2012] 6 CLJ 662, the court held as follows:

> (2) To succeed in the tort of negligence against the solicitor, it is incumbent on the client to establish that: (i) the solicitor owes the client a duty of care; (ii) there is a breach of that duty by the solicitor; (iii) the client has thereby suffered damage and (iv) the damage is not too remote (para 15);
>
> (3) TSI and the defendants had a close business relationship and TSI considered the defendants, in particular DW1, as his trusted business and legal confidante. *The defendants, as TSTs legal advisers, were bound to warn their client of the risks involved. It is the solicitor and not the client who has the better opportunity to assess and evaluate the gravity or remoteness of the risk involved in a particular transaction and it is the solicitor who has the necessary expertise to analyse and guard against the risk.* As such, the defendants had breached that duty of care (paras 17 & 35);
>
> (4) Where the solicitor is in breach of his contractual duty to his client, or where he fails to use proper care and as a result his client suffers loss, he is liable in damages even if the claim in negligence was purely for financial loss. In this case, there was a breach of duty by the defendants and as a result, the plaintiff suffered loss and damages (paras 38 & 40);
>
> ...
>
> (ii) the court finds that it is the duty of a solicitor, in particular, a conveyancing solicitor to ensure that all the documents pertaining to the transaction of land must be properly prepared, to carry out a thorough inquiry and to ensure that all the details which is stated in the transaction document is correct. It follows that DW2 owed a duty

> of care to ensure that all the documents for the transaction of Lots 643 and 644 are properly prepared and also to advise the plaintiff pertaining to the transaction of the purchase of Lot 643 and Lot 644 in all legal aspect. The defendant also has the duty to inform or notify the plaintiff that the land area measuring 3,133 square feet for Lot 643 and the land area measuring 1,614 square feet for Lot 644 had been surrendered to the State Authority in 1988 and that the land area measuring 8230.0594 square feet for Lot 643 and the land area measuring 7064.656 square feet for Lot 644 that stated in the land searches are not the net land areas for Lot 643 and Lot 644 at the material time;
>
> (iii) the court finds that the defendants owed a duty of care to advise the plaintiff of the implications of the endorsement of the 'surrendered area' for Lot 643 and Lot 644 and to exercise professional skill, care and diligence in advising the plaintiff and handling the sale and purchase transaction for Lot 643 and Lot 644. *The existence of a solicitor's duty of care under a retainer to advice in circumstances such as those under consideration did not depend on advice or information being specifically sought by the client. The defendants' duty extend beyond mere documentation and includes the duty to warn the plaintiff of anything that is unusual and anything that affect the plaintiff obtaining the benefit of the contract which he sought to obtained. Further, the defendants also have a duty to the plaintiff before the release of the balance purchase price of Lot 643 and Lot 644 and to prevent such release to the vendors after being informed by the plaintiff's representative of the 'surrendered area'.* Therefore, as a solicitor, the defendants owed the plaintiff a duty of care to exercise professional skill, care and diligence demanded by law in advising all legal aspect with regard to the transactions in handling the S&P of the two lots. (Emphasis added.)

[132] In this regard, the duty extends to any arising issues not initially outlined in their original instructions. The following is what His Lordship Syed Agil Barakbah FCJ said regarding this in *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39 at p 44:

> The principle applicable in a case of this nature as rightly applied by the learned Judge is that while the duty of a solicitor is directly related to the confines of the retainer, it is the incident of that contractual duty that he has to consult his client on all questions of doubt which do not fall within the express or implied discretion left him. It is also his duty to keep his client informed to such extent as may be necessary according to the same criteria (*Midland Bank Trust and Groom v Crocker*). The appellants had therefore failed to comply with the contractual duty as the respondents' solicitor to inform them of the issue and registration of the documents of title to the said land enable the respondents to secure the discharge of the developers' charge with BC Bank in accordance with the agreement.

Whether all the firm's partners are liable?

[133] If any of the firm's partners are found liable, are the other partners liable as well?

[134] As regards the position of the partners of the firm, based on my analysis of the facts and the law, it seems trite that all defendants who are partners of the legal firm are jointly and severally liable for all the acts and omissions of the legal firm and/or any solicitor acting in the ordinary course of their business. As a result, all partners are responsible for the bank's losses.

[135] This is in accordance with ss 11, 12 and 14 of the Partnership Act 1961:

> 11 Liability of partners
>
> Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.
>
> 12 Liability of firm for wrongs
>
> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.
>
> 14 Liability for wrongs joint and several
>
> Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under section 12 or 13.

CONCLUSION

[136] In light of the findings above, the bank's claims against the solicitors are allowed with costs in the amount of RM50,000, subject to allocatur.

Bank's claim against solicitors allowed with costs of RM50,000, subject to allocatur.

Reported by Dzulqarnain Ab Fatar